FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana

CC Docket No. 97-231

COMMENTS OF AMERITECH ON APPLICATION BY BELLSOUTH TO PROVIDE IN-REGION, INTERLATA SERVICES IN LOUISIANA

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November 25, 1997

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INTRODUCTION AND SUMMARY

Ameritech Corporation ("Ameritech") hereby submits its Comments in support of BellSouth's application for in-region, interLATA authority in Louisiana under Section 271 of the Telecommunications Act of 1996 ("1996 Act"). If BellSouth's factual allegations are correct, then it has satisfied the statutory prerequisites under Section 271 for interLATA entry. BellSouth's application should be approved so that BellSouth may contribute to a much-needed increase in competition for long distance services in Louisiana.

Ameritech will limit the scope of its comments to the issue of whether interconnection agreements with providers of Personal Communication Services ("PCS") may be used to satisfy Section 271(c)(1)(A). To succeed on its "Track A" application, BellSouth must show, inter alia, that it has interconnection agreements with and is providing access and interconnection to "competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access)." 47 U.S.C. § 271(c)(1)(A). BellSouth argues

that it has met this requirement through its agreements with providers of PCS services.[1/] Ameritech agrees. As described herein, both the law as it stood before the 1996 Act and the structure and language of the 1996 Act itself demonstrate that PCS carriers provide "telephone exchange service" as defined in Section 3(47)(A) and therefore can be Track A carriers.

In selecting this topic for further discussion, Ameritech does not mean to imply that it disagrees with other aspects of BellSouth's application. To the contrary, Ameritech strongly endorses BellSouth's position that the long distance business in the United States continues to be a highly concentrated oligopoly and that entry of the Bell companies will inject a highly desirable dose of additional competition into that business. See BellSouth Brief, pp. 88-101.

Ameritech also endorses BellSouth's showing that approval of its application will have a salutary effect on competition for local exchange services in Louisiana. See id., pp. 119-123. At present, some of the most powerful potential competitors, including AT&T, MCI, and Sprint, have chosen to remain completely or largely on the sidelines in many states. They apparently believe that their interest lies in protecting their own turf by keeping BOCs out of long distance and preventing them from providing full-service packages and, at the same time, declining to expend the effort and resources necessary to enter the local exchange business in those states. Permitting the BOCs to enter the long distance business will assuredly break this logjam immediately and radically, not only in Louisiana, but also in any other state in which BOC entry is permitted. If only to remain competitive with the BOCs in

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[1/] See Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, pp. 8-17 (Nov. 6, 1997) ("BellSouth Brief").

providing "one-stop shopping," the large interexchange carriers necessarily would have to enter the local exchange business on a substantial scale.

In short, the surest and most effective way to jump-start competition for both local exchange and long distance services is not, as some have erroneously urged the Commission, to micro-manage the operations of BOCs, but rather to unleash the BOCs to compete for long distance customers, which, in turn, will compel the interexchange carriers to compete for local exchange customers. In this way, the explicit goal of Congress in passing the 1996 Act -- to provide enhanced services and more competitive prices to all consumers by opening both the interexchange and local exchange businesses to enhanced competition -- can be accomplished successfully.[2/] Granting the BellSouth application would constitute a significant, positive step toward this Congressionally-mandated goal.

[2/] See H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996) (one of the purposes of the 1996 Act is "to provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.") (emphasis in original).

ARGUMENT

Section 3(47)(A) of the Federal Communications Act ("Communications Act"), defines "telephone exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 U.S.C. § 153(47)(A); see 47 C.F.R. § 51.5 (same).[3/] PCS falls within this definition. PCS services are provided over a radio-based network that is equivalent to an ordinary wireline exchange -- meaning they are "of the character ordinarily furnished by a single exchange."

Moreover, Congress, courts, and the Commission have long recognized that mobile services, including PCS, clearly qualify as "telephone exchange service" under Section 3(47)(A). For example, Section 221(b) of the Communications Act, limits the Commission's jurisdiction over "wire, mobile, or point-to-point radio" services, which it refers to together as "telephone exchange service." 47 U.S.C. § 221(b). Similarly, the MFJ court specifically found that mobile radio services provided by divested BOCs are "exchange telecommunications services." United States v. Western Elec. Co., Inc., 578 F. Supp. 643, 645 (D.D.C. 1983) ("All parties to this proceeding are in agreement . . . [that] mobile radio services are 'exchange telecommunications services' within the meaning of section II(D)(3) of the decree.")

[3/] This was the full definition of "telephone exchange service" prior to the 1996 Act. The 1996 Act added a new subsection (B) to the definition which is not referenced in Section 271(c)(1)(A).

In 1984, the Commission confirmed what Congress and the MFJ court had already acknowledged, finding that "[t]he RCCs' [radio common carriers] provide 'exchange service' under Sections 2(b) and 221(b) of the Communications Act, and we have consistently treated the mobile radio services provided by RCCs and telephone companies as local in nature."[4/] Two years later, the Commission applied the same reasoning to cellular service, finding that cellular carriers are "generally engaged in the provision of local exchange telecommunications in conjunction with the local telephone companies and are therefore 'co-carriers' with the telephone companies."[5/] The Commission recently reconfirmed that finding.[6/] Thus, as of the enactment of the 1996 Act, it was clear that providers of mobile services, including cellular, were consistently viewed as offering "telephone exchange service" under Section 3(47) of the Communications Act.[7/]

Consistent with this prior state of the law, several sections of the 1996 Act confirm that mobile services, such as PCS and cellular, fall within the definition of telephone

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4/ MTS/WATS Market Structure, 97 FCC 2d 834, 882, ¶ 149 (rel. Feb. 15, 1984) (emphasis added).

5/ Need to Promote Competition and Efficient Use of the Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 59 Rad. Reg.2d 1275, 1278, ¶ 12 (rel. Mar. 5, 1986) (emphasis added); id., Appendix B at 1284, ¶ 5 and n.3 (stating that "cellular carriers are generally involved in the provision of local, intrastate exchange telephone service" and referring the "holding in the Access Charge proceeding . . . that cellular carriers are exchange carriers") (emphasis added).

6/ See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rule Making and Notice of Inquiry, 9 FCC Rcd 5408, 5453, ¶ 107 n.192 (rel. July 1, 1994).

7/ These pre-1996 Act Commission decisions and Congressional pronouncements are significant because they interpreted the same definition of telephone exchange service now contained in Section 3(47)(A) (formerly 47 U.S.C. § 153(r)).

exchange services in Section 3(47)(A). First, Section 3(44) of the 1996 Act (47 U.S.C. ¶ 153(26)) defines "local exchange carrier" to include any person that provides "telephone exchange service." That same provision, however, specifically excludes providers of "commercial mobile service" -- which includes both PCS and cellular service.[8/] This can mean only one thing -- that both local exchange carriers and mobile service providers offer "telephone exchange service"; otherwise, there would be no need to specifically exclude mobile service providers from the definition. Indeed, it is generally recognized that "statutory exceptions exist only to exempt something which would otherwise be covered." 2A N. Singer, Statutes and Statutory Construction, § 47.11 at 166 (1992).[9/] Any other interpretation would mean that the specific exclusion of commercial radio service was superfluous. It is well settled, however, that statutes must not be interpreted in manner that makes an exception mere surplusage; rather, Congress must be presumed to have crafted the exclusion for a reason, i.e., to exclude what would otherwise be included.[10/]

This is confirmed by the legislative history. The Senate originally defined "local exchange carrier" to include any "provider of telephone exchange service or exchange access

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[8/] See 47 U.S.C. § 332(d)(1) (defining "commercial mobile service"); Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1461, ¶ 119 (rel. Mar. 7, 1994) ("All PCS spectrum will be presumed to be licensed as [commercial mobile service]."); Kellogg, Thorne & Huber, Federal Telecommunications Law, § 13.3.1g at 185-86 (1995 Supp.) (commercial mobile service under Section 332(d)(1) "includes cellular radio service . . . and PCS").

[9/] Cf. Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) ("Had Congress believed that restitution obligations were not 'debts' giving rise to 'claims,' it would have had no reason to except such obligations from discharge in § 523(a)(7).")

[10/] See Arkansas Best Corp. v. Commissioner of Internal Revenue, 485 U.S. 212, 218 (1988) ("we are unwilling to read [the definition of 'capital asset'] in a manner that makes surplusage of these statutory exclusions"); Davenport, 495 U.S. at 562.

service."[11/] The House of Representatives, however, specifically modified this definition to exclude "providers of commercial mobile service under section 332(c)." This change was necessary not because mobile service providers offer something other than telephone exchange service; rather, it was included to give the Commission leeway to decide when providers of commercial mobile service should be deemed to be "local exchange carriers" and subjected to all of the legal obligations of those carriers.[12/] Thus, Congress recognized that although commercial mobile service providers are now subject to different regulatory rules than local exchange carriers, both types of carriers currently provide telephone exchange service.

Second, Section 253(f) of the 1996 Act addresses the requirements that states may impose on carriers seeking to provide "telephone exchange service or exchange access in a service area served by a rural telephone company." This section, however, specifically excludes providers of "commercial mobile services," such as cellular and PCS, from having to meet such requirements before providing telephone exchange service or exchange access in such areas. 47 U.S.C. § 253(f)(2). Again, no such exclusion would be necessary unless providers of commercial mobile service otherwise would be deemed to provide telephone exchange service or exchange access. See supra. Congress cannot be presumed to have created a meaningless exception.

Third, Section 271(c)(1)A) itself demonstrates that commercial mobile services, such as cellular and PCS, qualify as telephone exchange services under Section 3(47)(A). While

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[11/] S. Rep. No. 104-230, 104th Cong., 1st Sess. 17 (1995).

[12/] See H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 126 (1995).

subsection (c)(1)(A) defines Track A carriers as "providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access)," Congress specifically excluded only cellular service from that category.[13/] This exclusion, too, cannot be mere surplusage. Rather, as the Commission found, "if Congress did not believe that cellular providers were engaged in the provision of telephone exchange service, it would not have been necessary to exclude cellular providers from this provision." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16000, ¶ 1014 (rel. Aug. 8, 1996) ("Local Competition Order"); see id. at 15999, ¶ 1013 (citing with approval earlier orders finding that cellular carriers provide telephone exchange service).[14/] Indeed, this conclusion is reinforced by Congress' statement that cellular services were excluded from the definition of telephone exchange service solely "[f]or the purpose of this subparagraph." 47 U.S.C. 271(c)(1)(A).

Thus, cellular service, like other commercial mobile services, normally would fall within the definition of telephone exchange access under Section 3(47)(A), unless specifically excepted. Even more significant for purposes of BellSouth's application, however, is the

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[13/] Section 271(c)(1)(A) states that "services provided pursuant to subpart K [sic, should be H] of part 22 of the Commission's regulations shall not be considered to be telephone exchange services." The Part 22 regulations deal exclusively with cellular services. PCS is regulated under Part 24.

[14/] While finding that cellular service normally would come within the definition of telephone exchange service in Section 3(47)(A), the Commission also declared that "[a]t a minimum," PCS and other mobile services fall within the definition of telephone exchange service in Section 3(47)(B), which was added by the 1996 Act and is not referenced in Section 271(c)(1)(A). Local Competition Order, 11 FCC Rcd at 15999, ¶ 1013. However, while it is clear that as a technical and commercial matter PCS is a telephone exchange service, the Commission did not address -- because it did not need to -- whether PCS also fell within subpart (A) of Section 3(47).

precision with which Congress drew the exception in Section 271 as compared to other provisions. As discussed above, Sections 3(44) and 253(f) exclude all providers of all commercial mobile services from being treated as offering telephone exchange service. In Section 271(c)(1)(A), by contrast, Congress departed from this path and carefully carved out a specific exception for providers of cellular services alone. This precise drafting demonstrates that Congress did not intend to exclude providers of other commercial mobile services -- including PCS -- from being providers of telephone exchange service for the purposes of Section 271 and Track A. Had Congress meant to so exclude providers of other commercial mobile services it could have -- and would have -- done so, as it did in Sections 3(44) and 253(f).

Furthermore, the conclusion that Congress meant to include PCS under Track A is compelled by the age-old canon of statutory construction, expressio unius est exclusio alterius. By explicitly excluding cellular service, and only cellular service, from Track A, Congress -- which obviously could have excepted the broader class of commercial mobile services and which is presumed to have known of the past statutory and regulatory treatment of providers of such services as offering telephone exchange services -- implicitly included PCS and all other non-cellular telephone exchange services for the purposes of Track A.[15/] No other interpretation of Section 271 would be consistent with the structure and language of the 1996 Act and basic principles of statutory interpretation.

[15/] Cf. In re TMI, 67 F.3d 1119, 1123 (3d Cir. 1995) (punitive damage claims were necessarily available because they were not included in the statute's list of excluded claims); Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1576 (Fed. Cir. 1995) (specific exclusion of one type of demand for payment from definition of a "claim" necessarily "implies that all other written demands seeking payment as a matter of right are 'claims'").

CONCLUSION

In sum, because (1) providers of commercial mobile services, such as cellular and PCS, were deemed to provide "telephone exchange service" as defined in Section 3(47)(A) prior to the 1996 Act; (2) the structure and language of the 1996 Act confirm that providers of commercial mobile services, such as cellular and PCS, continue to provide "telephone exchange service"; and (3) Section 271(c)(1)(A) excludes only cellular service from being a "telephone exchange service," PCS must be viewed as a telephone exchange service under Section 3(47)(A) and PCS providers must be eligible as Track A carriers. Accordingly, BellSouth has met the requirements of Section 271(c)(1)(A).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 1997, I caused copies of the Comments of Ameritech on the Application By BellSouth To Provide In-region, InterLATA Services in Louisiana to be served upon the parties listed below by first-class mail, postage prepaid.

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